92-1396

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

MORRIS INDUSTRIAL BUILDERS, INC., a New Jersey Corporation,

Petitioner,

vs.

THE TOWNSHIP OF SOUTH BRUNSWICK in the County of Middlesex, a municipal corporation of the State of New Jersey, THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF SOUTH BRUNSWICK, THE PLANNING BOARD OF THE TOWNSHIP OF SOUTH BRUNSWICK,

Respondents.

Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Due Process Clause of the Fourteenth Amendment as construed in *McKesson v. Division of Alcoholic Beverages,* 496 U.S. 18 (1990) entitle citizens to a "clear and certain remedy" for improper collection of money in violation of state, as well as federal, law?

2. Does *McKesson* apply only to taxes, or to any governmentcompelled payment of money?

3. Was petitioner real estate developer denied a "clear and certain remedy" for illegally collected development fees by the New Jersey appellate court's mistaken application of the choice-of-law factors of *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971)?

RULE 29.1 STATEMENT

There are no parent companies or subsidiaries of Morris Industrial Builders, Inc.

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OPINIONS BELOW

Frank A. Greek & Sons. Inc. v. The Township of South Brunswick, 257 N.J. Super. 94, 607 A.2d 1359 (App. Div. 1992), *certif. denied,* __ N.J. __, __ A.2d __ (1992) (1a, 18a).

STATEMENT OF JURISDICTION

Petitioner, Morris Industrial Builders, Inc., invokes the Court's jurisdiction to review the June 16, 1992 final judgment of the New Jersey Superior Court, Appellate Division, where petitioner's rights under the Fifth and Fourteenth Amendments to the United States Constitution were drawn into question (1a). *See* 28 U.S.C. § 1257(a). The New Jersey Supreme Court denied discretionary review of this judgment by order dated November 23, 1992 (00a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

> . . . Nor shall any person . . . be deprived of life, liberty or property, without due process of law; . . .

U.S. Const. Amend. 5.

The Fourteenth Amendment states:

> Section 1 . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; . . . .

U.S. Const. Amend. 14 § 1.

STATEMENT OF THE CASE

In *Southern Burlington County NAACP v. Mt. Laurel Township*, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975) (*Mt. Laurel I*), the New Jersey Supreme Court held that developing municipalities were required by the New Jersey Constitution to provide a realistic opportunity for development of low-income and moderate-income housing. In *Southern Burlington County NAACP v. Mt. Laurel Township*, 92 N.J. 158, 456 A.2d 390 (1983) (*Mt. Laurel II*), the court went further and imposed an affirmative obligation on every municipality to provide its fair share of affordable housing. Some municipalities, including respondent Township of South Brunswick, attempted to finance their *Mt. Laurel II* obligation by requiring real estate developers to contribute to affordable-housing trust funds as a condition of securing land use approvals from local planning and zoning boards.

Petitioner is an industrial developer headquartered in Secaucus, New Jersey. Beginning in the 1970's, Morris and its affiliates appeared regularly before the South Brunswick Planning Board for approval to construct warehouse/office buildings in the industrial section of the Township. In response to *Mt. Laurel II*, the Township adopted an affordable-housing trust fund ordinance which imposed development fees on most commercial and residential development as a condition for site-plan or subdivision approval. The fees for non-residential developments depended on the type of project involved, ranging from twenty-five to fifty cents per square foot. From 1988 to 1990, $602,580.89 was deposited under protest with the Township's affordable-housing trust fund on six Morris projects.[1]

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1. There was no procedure available for challenging the validity of these fees before their exaction, except for commencement of expensive and protracted legal proceedings which would have delayed and, in some cases, terminated the projects.

Several builders' associations initiated suits in the New Jersey Superior Court challenging South Brunswick's ordinance and those of four other municipalities. The associations claimed that the ordinances were *ultra vires,* an invalid tax in violation of the New Jersey Constitution's uniform property taxation requirement, a taking without just compensation, and a denial of due process and equal protection in violation of the United States and New Jersey Constitutions.

In *Holmdel Builders Ass'n v. Township of Holmdel,* 121 N.J. 550, 583 A.2d 277 (1990), decided December 13, 1990, the New Jersey Supreme Court found these ordinances invalid, but not on constitutional grounds. The court held that municipalities could collect such fees only pursuant to uniform regulations of the New Jersey Council on Affordable Housing ("COAH"), a state agency entrusted with oversight of affordable housing development. Since that agency had never promulgated any regulations, the court found that the challenged ordinances "were not validly adopted[.]" 121 N.J. at 585. The court did not reach the constitutional issues raised, except to "observe that insofar as those contentions are addressed to the facial validity of the development-fee ordinances in these cases, they do not have merit." *Id.* at 581. The court then considered the New Jersey Builders Association's claim for a refund on behalf of its members and dismissed for lack of standing "without prejudice to the right of individual members to seek refunds in separate actions." *Id.* at 586.

On January 28, 1991, COAH disseminated to New Jersey municipalities a so-called "Administrative Order" announcing its intent to adopt the sort of regulations envisioned in *Holmdel,* and "ordering" that municipalities "may" in the meanwhile retain funds previously collected from developers like Morris.[2] On May

2. For several weeks following *Holmdel,* the Township refunded contributions to some builders voluntarily. A new political administration took control of the Township Committee in January and promptly reversed this position.

1991, Morris commenced an action in the New Jersey Superior Court seeking a refund of its contributions. The claim was consolidated with several others already pending against the Township.

On July 19, 1991, before COAH had proposed and adopted any regulations, the trial judge granted summary judgment to Morris and its fellow developers and ordered an immediate refund (25a-38a). The judge was satisfied he was implementing the obvious intention of the State Supreme Court in *Holmdel.* Respondents unsuccessfully attempted to persuade him to delay action until COAH could adopt regulations which might validate, retroactively, collection of the fees already in the Township's custody. The trial judge refused because COAH was unable to represent when such regulations would be adopted and, more importantly, because no such regulations could lawfully revive South Brunswick's ordinance in any case.

The Township and COAH appealed to the Appellate Division, New Jersey's intermediate appellate court, where the matter was consolidated for argument and decision with appeals from similar decisions in several other municipalities. On January 21, 1992, six months before the appeal was argued, COAH finally adopted regulations authorizing municipalities to adopt development-fee ordinances and to apply them retroactively to fees collected prior to the December 1990 *Holmdel* decision. Several builders filed a separate appeal with the Appellate Division from the adoption of these new regulations. Morris' application for leave to participate in that appeal was summarily denied.

On June 16, 1992, a three-judge panel of the Appellate Division unanimously held that the trial judge granted Morris summary judgment too hastily. *Frank A. Greek v. South Brunswick Tp.*, 257 N.J. Super. 94, 607 A.2d 1359 (App. Div. 1992), *certif. denied*, __ N.J. __, __ A.2d __ (1992) (1a, 18a). The court rejected the trial judge's conclusion that the State Supreme Court intended

for developers like Morris to receive refunds automatically:

> Undoubtedly, the Court recognized that the invalidation of the ordinances would not necessarily require a complete refund. In such matters, issues concerning the disruption of governmental policies and other equitable considerations determine whether a decision of this nature should be given prospective effect only, ... retroactive effect, ... or partial retroactive effect[.]

257 N.J. Super. at 103-104 (12a-13a). Without reaching the validity of the new regulations then the subject of a separate appeal, the panel held that COAH had the "potential power" to validate the prior levies, relying on caselaw upholding curative legislation to rectify imperfect exercises of government power. The matter was remanded to the trial judge with instructions to stay further action until the validity of the new regulations had been thoroughly tested.[3]

Morris petitioned the New Jersey Supreme Court for discretionary review of the Appellate Division's decision.[4] The petition argued that the Appellate Division confused retroactivity as a choice of law with the constitutional duty to provide the "clear and certain remedy" mandated by *Atchison T.& S.F.R. Co. v. O'Connor*, 223 U.S. 280, 285-286 (1912), recently reaffirmed in

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3. Petitioner's contributions have remained in an interest-bearing account in the Township's custody throughout this litigation.

4. Under New Jersey Court Rule 2:2-5(b), the Appellate Division's decision is considered a final judgment for purposes of review by the New Jersey Supreme Court, even though it remanded to the trial court for further proceedings.

McKesson v. Division of Alcoholic Beverages, 496 U.S. 18 (1990).The New Jersey Supreme Court summarily denied review on November 23, 1992 (18a).

REASONS FOR GRANTING THE WRIT

The Fifth Amendment to the Constitution of the United States provides:

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U.S. Const. Amend. 5.

The Fourteenth Amendment states:

> Section 1 . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; . . . .

U.S. Const. Amend. 14 § 1.

The procedural guarantees of the Fourteenth Amendment apply whenever the State removes or significantly alters property interests recognized and protected by state law. *Paul v. Davis,* 424 U.S. 693, 710-711 (1976). It is difficult to conceive of any definition of "property" that would not include one's own money. Citizens are "deprive[d]" of this property interest whenever Government requires them to part with their funds.

A loss of money may be compelled through judicial,

administrative or legislative action. The effect on the citizen's wallet is the same in each case, but the "process" that is "due" may differ. When it takes the form of a money judgment or fine in a judicial proceeding, the Court's precedents plainly require advance notice and a meaningful opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 333-335 (1976). When a tenured government employee loses salary as a result of administrative action like suspension or termination of employment, due process requires "some kind of hearing". *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).

The Due Process Clause applies to legislative action as well, although the entitlement to *individualized* consideration is less. In *Bi-Metallic Investment Co. v. State Board of Equalization of Colorado*, 239 U.S. 441 (1915), Justice Holmes wrote:

> Where a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.

Id. at 445. More recently, in *United States v. Locke*, 471 U.S. 84, 108 (1985), Justice Marshall stated:

> In altering substantive rights through enactment of rules of general applicability, a legislature generally provides constitutionally

> adequate process simply by enacting the statute, publishing it, and, to the extent the statute regulates private conduct, affording those within the statute's reach a reasonable opportunity both to familiarize themselves with the general requirements imposed and to comply with those requirements.

See also Logan v. Zimmerman Brush Co., 455 U.S. 422, 433 (1982) ("... [T]he legislative determination provides all the process that is due[.]"). When property rights are disturbed by a legislative body without appropriate enabling authority or compliance with prescribed legislative procedures, however, the Fourteenth Amendment is still offended. That is what happened here.

Most of the cases reaching this Court involving due process and the payment of money have involved taxation. The Court in *McKesson v. Division of Alcoholic Beverages,* reaffirmed the principles stated by Justice Holmes in *Atchison T.& S.F.R. Co. v. O'Connor:*

> It is reasonable that a man who denies the legality of a tax should have a clear and certain remedy. The rule being established that apart from special circumstances he cannot interfere by injunction with the State's collection of its revenues, an action at law to recover back what he has paid is the alternative left. Of course we are speaking of those cases where the State is not put to an action if the citizen refuses to pay. In these latter he can interpose his objections by way of defence, but when, as is common, the State has a more summary remedy, such as distress, and the party indicates by protest that

> he is yielding to what he cannot prevent, courts sometimes perhaps have been a little too slow to recognize the implied duress under which payment is made. But even if the State is driven to an action, if at the same time the citizen is put at a serious disadvantage in the assertion of his legal, in this case of his constitutional, rights, by defence in the suit, justice may require that he should be at liberty to avoid those disadvantages by paying promptly and bringing suit on his side.

283 U.S. at 285-286, quoted in *McKesson, supra,* 496 U.S. at 32-33.

In *Carpenter v. Shaw,* 280 U.S. 363 (1930), the Court held that "a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment." *Id.* at 369. In *Montana Nat'l Bank v. Yellowstone County,* 276 U.S. 499 (1928), the Court stated: "[A taxpayer] cannot be deprived of its legal right to recover the amount of tax[es] unlawfully exacted of it by [a] later decision which, while repudiating the construction under which the unlawful exaction was made, leaves them thus exacted in the public treasury." 276 U.S. at 504-505.

The federal right to retroactive relief is not limited to unconstitutional taxation. In *Owen v. City of Independence,* 445 U.S. 622 (1980), for example, the Court held that a city is not entitled to immunity from damage claims in an action under 42 U.S.C. § 1983. The Court reached that result in large part because it was consonant with general remedial principles: "[A] damages remedy against the offending party is a vital component" of any remedial scheme (445 U.S. at 651). The Court added that "[i]t hardly seems unjust to require a municipal defendant which has

violated a citizen's constitutional rights to compensate him for the injuries suffered thereby. . . . Elemental notions of fairness dictate that one who causes a loss should bear that loss." *Id.* at 654; *see also Bivens v. Six Unknown Named Agents,* 403 U.S. 388, 396 (1971); *id.* at 407-409 (Harlan, J., conc.).

The Court concluded in *Owen* that these remedial considerations apply with particular force when the violation stems from official government policy. "[T]he importance of assuring [the] efficacy [of a scheme for vindicating constitutional rights] is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed." 445 U.S. at 651. In this situation especially, "it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights . . . have been violated." *Id.* at 655. *See also Ward v. Board of County Commissioners,* 253 U.S. 17, 24 (1920) ("[t]o say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these [taxpayers] arbitrarily and without due process of law"); and *District of Columbia v. Thompson,* 281 U.S. 25, 31 (1930) (citing *Ward* for the principle that government must make restitution of funds held "in its treasury . . . which it has no right in equity, good conscience, or common honesty to retain").

There are striking parallels between the tax refund cases and others where there is a governmental taking of private property requiring payment of just compensation. *See Ward,* 253 U.S. at 24 (characterizing the county's refusal to provide refunds as a "tak[ing]" of the taxpayers' property). In both circumstances, the individual is deprived of ownership or use of property under the compulsion of government authority, but, upon judicial examination, the government is held to have no right to act as it did.

In the takings situation, the government must either discontinue its conduct or pay just compensation for the full value of the property. Whichever course it chooses, it must return to the property owner the value of the property taken prior to the judicial determination. *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304 (1987). The analysis here is informed by the Framers' conclusion — embodied in the Takings Clause — that government is not entitled simply to restore the property to its owner for future use. Instead, it must make restitution (in the form of just compensation) for the value taken prior to restoration of the property. In the context of taxes and fees, government should have a comparable obligation not only to stop, but to restore the aggrieved party to the position it would have enjoyed but for the unlawful exaction.

These rights are triggered whenever a court makes "fully retroactive" a decision invalidating a tax or fee. "Full retroactivity" means application of a holding "both to the parties before the court and to all others by and against whom claims may be pressed. . . ." *James B. Beam Distilling Co. v. Georgia,* 501 U.S. __, __ (1991). A court's determination to apply a rule of law "forward" or "backward" is governed by reliance interests and other equitable considerations reflected in the three-factor test of *Chevron Oil Co. v. Huson,* 404 U.S. 97, 106-107 (1971).[5] Once the decision is made to apply a rule of law "backward", however, "*McKesson* establishes that equitable considerations play only the most limited role in delineating the scope of that relief." *American Trucking Assns. v. Smith,* 496 U.S. 167, 181 (1990).

Holmdel was "fully retroactive". The court explicitly found

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5. The New Jersey courts apply the *Chevron* test to determine the retrospective effect of their rulings whether the substantive rights in question arise under federal or state law. *See Crespo v. Stapf,* 128 N.J. 351, 365-66, 608 A.2d 241 (1992).

that the ordinances before it had not been adopted lawfully, and "set [them] aside . . . without prejudice to the right of individual [developers] to seek refunds in separate actions." 121 N.J. at 586. Even if the court did not intend that refunds automatically flow, as the Appellate Division later held, Morris was still entitled to *some* form of prompt, meaningful relief.

Under *McKesson*, the Due Process Clause requires that the remedy rectify the legal flaw which invalidated the exaction in the first place. Where an otherwise lawful tax is struck down as discriminatory, the legal infirmity stems not from deprivation of the taxpayer's money *per se*, but from failure to treat similarly situated parties equitably. The appropriate remedy in that case might be equalization of the burden, rather than a complete refund. Discrimination was not what invalidated the development fees in this case.

The ordinance here was set aside for lack of uniform enabling regulations. As the New Jersey Supreme Court saw it, COAH would not merely rubberstamp the ordinances already in place, but would develop from scratch a statewide framework for exaction of such fees, informed by practical insights and policy concerns developed in the administrative rule-making process:

> . . . [W]e determine that COAH, through its rulemaking procedures, should specify standards for development fees, so that municipalities may consider employing such fees as inclusionary-zoning devices in designing their housing elements under the [New Jersey Fair Housing Act]. Regulatory standards will enable us to determine that persons subject to such ordinances have been reasonably informed of their obligations, and that both municipalities and COAH in the

> adoption and approval of such ordinances are acting in conformity with the legislative intent of the [Fair Housing Act].
>
> Such regulations will define more precisely the impact and effect of development fees. They presumably will address the types of developments that will be subject to fees, the amount and nature of the fees imposed, the relationship of fees to other inclusionary-zoning measures such as mandatory set-asides and density bonuses, the conditions for the creation and administration of affordable-housing trust funds, the requirements for the use and application of such funds, and whether a system of development fees should include counterbalancing density bonuses. . . . Because we cannot and should not prognosticate what scheme COAH will devise for non-residential development fees, we do not determine on the present record whether development fees without bonuses might or might not in a particular application be constitutionally objectionable.
>
> COAH, in the exercise of sound administrative discretion, should consider the desirability and feasibility of such development fees in the broader context of the State's affordable housing policy.

Holmdel, 121 N.J. at 579-80.

Adherence to prescribed legislative procedure is required by the Due Process Clause before a police power regulation can

require citizens to pay money. The court plainly had in mind more than curative legislation to correct a technical defect in South Brunswick's ordinance.[6]

Respondents may argue that *McKesson* is limited to taxes in the strict sense and, even then, only when collected in violation of federal, not just state, law. We do not read that decision so narrowly, and can conceive of no legal or policy reasons why the Court's holding should be so narrowly construed. The few lower courts addressing the issue agree. In *Smith v. Travis County Educ. Dist.*, 791 F. Supp. 1170 (W.D. Tex. 1992), also a tax case, District Judge Nowlin reached the same conclusion:

> In *McKesson*, the Supreme Court in no way limited its holding to state taxes that are only in violation of the United States Constitution. The Due Process Clause applies to any unlawful collection of taxes. [Footnote omitted.]

Id. at 1178. Earlier in his opinion, he highlighted an excerpt from

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6. The New Jersey courts have long sanctioned retroactive ratification of technically defective exercises of government power. The "curative act" doctrine originated in the context of ratifying contracts, *Houman v. Mayor & Coun. Bor. Pompton Lakes*, 155 N.J. Super. 129, 160, 382 A.2d 413 (Law Div. 1977), and was later extended to other government actions. *Houman* (decision to proceed with tax appeal); *Ferreira v. City of Asbury Park*, 237 N.J. Super. 142, 567 A.2d 230, *certif. denied*, 121 N.J. 627, 583 A.2d 324 (1990) (ratification of land use ordinance without prior reference to planning board); *Edgewater Park v. Edgewater Park Housing Auth.*, 187 N.J. Super. 588, 602, 455 A.2d 575 (Law Div. 1980) (employment of legal counsel). Curative legislation has been limited to procedural or technical irregularities not affecting the substance of the action. *State, of Vreeland et al., pros. v. Town of Bergen*, 34 N.J. Eq. 438 (Sup. Ct. 1871). When the irregularity is likely to affect the substance of the action, such legislation has been rejected. *Groel v. Newark*, 78 N.J.L. 142, 73 A. 522 (Sup. Ct. 1909).

Justice Holmes' opinion in *O'Connor* implying that due process attaches whenever the State collects money in violation of any "legal . . . rights". *O'Connor*, 223 U.S. at 285-286, quoted at 791 F. Supp. at 1177, n.3. *See also O'Connell Management Co. v. Massuchesetts Port Authority*, 744 F. Supp. 368, 378, n. 13 (D. Mass. 1990), applying *McKesson* to all government-compelled fees.

The thrust of *McKesson* is that an aggrieved party is entitled to be restored to the same position he would have occupied if a meaningful predeprivation challenge had been available. Morris has been denied this right for over two years, in a setting rife with well-intentioned abuse of government authority. For the seven month period between the *Holmdel* decision and argument of Morris' summary judgment motion, South Brunswick retained the improperly collected development fees under the aegis of an "Administrative Order" from COAH without a scintilla of legal authority.[7] The trial judge was disturbed at the prospect of leaving the developers twisting in the wind indefinitely, even if the agency had the power to adopt retroactive regulations:

> THE COURT: Ms. Callahan, before you begin your argument perhaps you can help me on a couple of questions I might have. As I understand it from your position, the Council is currently considering forms of regulations which they now intend to adopt sometime in the future. Is that right?
>
> MS. CALLAHAN: Yes, Your Honor.

---

7. It was not really an "order" at all — at least not in the sense of a compulsory directive. It "ordered" that municipalities "may" retain the monies until COAH adopts statewide regulations and the municipalities, in turn, promulgate ordinances conforming to their requirements. *See* further discussion by the trial judge at 30a-32a.

THE COURT: Okay. And I'm a little fuzzy on my administrative law but if I understand correctly I'm asking you now, first you reach tentative drafts of regulations. Correct?

MS. CALLAHAN: Yes, Your Honor. If you'd like, I could give you a little summary of how the rule —

THE COURT: And then from there you advertise and have hearings published?

MS. CALLAHAN: Correct. You don't necessarily have to have hearings. You allow the opportunity for comment.

THE COURT: Comment. Okay.

MS. CALLAHAN: And generally that is written -

THE COURT: And that is a formal adoptive process?

MS. CALLAHAN: Yes.

THE COURT: Okay. And I suppose they've been doing this since January or at least since the *Holmdel* case was decided?

MS. CALLAHAN: Yes, Your Honor.

THE COURT: When would you anticipate the Council would have these adopted regulations?

MS. CALLAHAN: Filing in place, I would guess December and —

THE COURT: Would you bet me, would you be willing to pay all your co-counsel for lunch? There's a restaurant here called La Fontana. It's very expensive.

MS. CALLAHAN: I know that one.

THE COURT: Would you be willing to buy lunch for everybody if these aren't formally adopted by December?

MS. CALLAHAN: Almost, Your Honor.

THE COURT: Out of your own pocket?

MS. CALLAHAN: Almost, because —

THE COURT: Almost?

MS. CALLAHAN: I say almost because I'm fairly certain that they will be done by then because, number one, the Council already had proposed regulations, orders in June. They did not formally propose them in the New Jersey register because some policy issues needed to be ironed out, so they anticipate to have all that ironed out for the proposal to go in the register for August or September. Then there's also a thirty day comment period. Then after that the agency can adopt the regulations.

* * *

THE COURT: . . . I was just discussing timing and what happens when the municipalities that wish to voluntarily become part of this have to adopt ordinances, do they not?

MS. CALLAHAN: Yes, Your Honor.

THE COURT: Okay. And we all know how fast municipalities move, do their drafting, so I would guess that if everything went as quick as you think it might, somewhere in the summer of 1992 South Brunswick might have an ordinance in place that could then be — properly be challenged.

MS. CALLAHAN: I would hope it would be before then.

THE COURT: I know you would hope.

MS. CALLAHAN: I cannot guess as to what would happen.

THE COURT: Okay. And of course you would agree, given the issues that are involved in the legal history, that no matter what happens there certainly would be a challenge in the Court, both to the ordinance and to the regulations again.

MS. CALLAHAN: Yes, Your Honor.

THE COURT: Which probably would not be resolved until the Supreme Court resolution two years after that. So we'd be talking about

> holding on to this money somewhere until 1994, 1995 until the resolution of the issue.
>
> MS. CALLAHAN: Your Honor, the money is being held in a separate interest bearing account.
>
> THE COURT: I understand that. That wasn't my question, Counsel. We can reasonably predict under your scenario at least another four years before these people even will have an opportunity under your suggestion to get their money back, if in fact they are entitled to it.
>
> MS. CALLAHAN: Your Honor, I am not willing to predict how long it will take.

(20a-24a).

At the conclusion of the argument, the judge ruled:

> . . . [T]here is no clear schedule [for adopting regulations by COAH]. There are some fond hopes that it will be done sometime by the end of this year and that perhaps all the public bodies will act in appropriate fashion sometime by the middle of next year or perhaps a little later, which would only then for the first time, following COAH's argument, would permit the plaintiffs here to challenge the sufficiency of those ordinances and regulations in an attempt to get back the money that was concededly paid pursuant to an invalid, whether you call it an invalidly adopted or

invalid in general, an ordinance which had no legal effect and under which constitutionally is the only way a public entity, whether it be a legislature or a municipality or a county can exact from private persons monies.

There's only certain ways in a republican or democratic society — I use those with the small letters — that governments may extract from its citizens money. That indeed is that which separates us from other forms of government.

And it is not, as I've ever understood it, in our Constitutional process permitted that monies may be held or obtained by a simple letter of an appointed public official. It frankly staggers the mind.

(31a).

* * *

I really don't understand and I rule here as a matter of law that any regulation, even one validly adopted *in futuro* and validly adopted by the municipality, would constitute an *ex post facto* rule or regulation, and you cannot now resuscitate that which was exacted illegally in the first place. Hiding the gun after the robbery doesn't make it legal.

(35a).

On appeal, the Appellate Division held that it was premature to consider a remedy for petitioner until COAH developed regulations, determined whether to apply them retroactively and had them tested in the courts. The sole authority relied on was the New Jersey Supreme Court's formulation of the *Chevron* retroactivity doctrine. 257 N.J. Super. at 103-104, citing *Salorio v. Glaser*, 93 N.J. 447, 465-67, 461 A.2d 1100, *cert. denied*, 464 U.S. 993 (1983) (12a-13a). This was plainly wrong since the New Jersey Supreme Court's decision in *Holmdel* was retroactive. From that point forward, petitioner was entitled under *McKesson* to a "clear and certain remedy". The trial judge's determination to award a refund certainly met the Court's minimum constitutional standard. The Appellate Division's treatment of the question did not.

CONCLUSION

The Court should grant certiorari to review the Appellate Division's erroneous judgment.

Respectfully submitted,

DAVID B. RUBIN
Counsel of Record
Rubin, Rubin, Malgran, Kaplan & Kuhn
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APPENDIX A — OPINION OF NEW JERSEY SUPERIOR COURT, APPELLATE DIVISION, FILED JUNE 16, 1992

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-6073-90T3
A-6080-90T3
A-205-91T3
A-206-91T3
A-394-91T3
A-429-91T3

FRANK A. GREEK & SONS, INC., DKM PROPERTIES CORPORATION, RICHARD V. NELSON, I. HELLER CONSTRUCTION COMPANY, INC. AND M. ALFIERI COMPANY, INC.,

Plaintiffs-Respondents,

v.

THE TOWNSHIP OF SOUTH BRUNSWICK in the County of Middlesex, the TOWNSHIP COMMITTEE OF SOUTH BRUNSWICK and the PLANNING BOARD OF THE TOWNSHIP OF SOUTH BRUNSWICK OF ADJUSTMENT,

Defendants-Appellants.

TIMBER PONDS, INC.,

Plaintiff-Respondent,

v.

Appendix A

TOWNSHIP OF SOUTH BRUNSWICK, in the County of Middlesex, the TOWNSHIP COMMITTEE OF SOUTH BRUNSWICK and the PLANNING BOARD OF THE TOWNSHIP OF SOUTH BRUNSWICK BOARD OF ADJUSTMENT,

Defendants-Respondents.

MORRIS INDUSTRIAL BUILDERS, INC.,

Plaintiff-Respondent,

v.

TOWNSHIP OF SOUTH BRUNSWICK, in the County of Middlesex, a municipal corporation of the State of New Jersey, THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF SOUTH BRUNSWICK, THE PLANNING BOARD OF THE TOWNSHIP OF SOUTH BRUNSWICK,

Defendants-Appellants.

FRANK DIMISA, d/b/a FOX RUN II, and McCAMPBELL DEVELOPMENT, INC., a New Jersey Corporation,

Respondents,

v

THE TOWNSHIP OF HOLMDEL, in the County of Monmouth, THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF HOLMDEL and THE PLANNING BOARD OF THE TOWNSHIP OF HOLMDEL,

Appellants.

Appendix A

EUGENE J. LONG,

Respondent,

v.

THE TOWNSHIP OF CHESTER, in the County of Morris, a municipal corporation of the State of New Jersey, and the MAYOR AND TOWNSHIP COUNCIL OF THE TOWNSHIP OF CHESTER,

Defendants.

CHESTERFIELD FARMS, DIRAJE CORPORATION, CHESTNUT RUN LIMITED PARTNERSHIP, CUSTOM LIVING HOMES, INC., TWIN BROOKS LIMITED PARTNERSHIP, ARTHUR N. FURHMAN, KENDALL WOODS LIMITED PARTNERSHIP and KENDALL CONSTRUCTION CORPORATION,

Plaintiffs,

v.

THE TOWNSHIP OF CHESTER in the COUNTY OF MORRIS, a municipal corporation of THE STATE OF NEW JERSEY and THE MAYOR AND TOWNSHIP COUNCIL OF THE TOWNSHIP OF CHESTER,

Defendants.

REALTY TRANSFER COMPANY LIQUIDATING TRUST,

Plaintiff,

v.

Appendix A

TOWNSHIP OF CHESTER, COUNTY OF MORRIS, a municipal corporation of THE STATE OF NEW JERSEY and THE TOWNSHIP COUNCIL OF THE TOWNSHIP OF CHESTER,

Defendants.

CHERRY HILL PROPERTIES CORPORATION,

Respondent,

v.

THE TOWNSHIP OF CHERRY HILL in the County of Camden, a Municipal Corporation of the State of New Jersey, and THE TOWNSHIP COUNCIL OF THE TOWNSHIP OF CHERRY HILL,

Appellants,

and

COUNCIL ON AFFORDABLE HOUSING (COAH),

Intervenor-Appellant.

Argued March 30, 1992 - Decided June 16, 1992

Before Judges Bilder, Stern and Keefe.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County (A6073-90T3; A-6080-90T3) Monmouth County (A205-91T3) Morris County (A-206-91T3), Camden County (A-394-91T3; A-429-91T3).

Appendix A

Geraldine Callahan, Deputy Attorney General, argued the cause for appellant Council on Affordable Housing (Robert J. Del Tufo, Attorney General of New Jersey, attorney; Joseph L. Yannotti, Assistant Attorney General, of counsel; Ms. Callahan, on the brief).

Edward L. Picone argued the cause for appellant Township of South Brunswick (Lawrence W. Saltzman, on the brief).

Francine I. Axelrad argued the cause for appellants, The Township of Cherry Hill and the Township Council of the Township of Cherry Hill.

Thomas F. Carroll, III argued the cause for respondents, Frank A. Greek & Sons, Inc., DKM Properties Corporation, Richard V. Nelson, I. Heller Construction Company, Inc., M. Alfieri Company, Inc., Timber Ponds, Inc., Frank DiMisa d/b/a Fox Run II, McCampbell Development, Inc., Eugene J. Long, Chesterfield Farms, Diraje Corporation, Chestnut Run Limited Partnership, Custom Living Homes, Inc., Twin Brooks Limited Partnership, Author N. Furhman, Kendall Woods Limited Partnership and Kendall Construction Corporation (Hill Wallack, attorneys).

David B. Rubin argued the cause for respondent, Morris Industrial Builders, Inc. (Rubin, Rubin, Malgran & Kuhn, attorneys).

Eugene Iadanza argued the cause for respondent, Township of Holmdel and the Township Committee of the Township of Holmdel (Tucci, Iadanza & Reisner, attorneys).

Gary T. Hall argued the cause for respondents, Township of Chester and the Mayor and Township Council of the Township of Chester (McCarter & English, attorneys).

Appendix A

Jeffrey Kantowitz argued the cause for respondents, Realty Transfer Company Liquidating Trust and Cherry Hill Properties Corporation (Greenbaum, Rowe, Smith, Ravin & Davis, attorneys; Mr. Kantowitz, of counsel; Deirdre Moore, on the brief).

The opinion of the court was delivered by KEEFE, J.A.D.

After the Supreme Court issued its decision on December 13, 1990, in *Holmdel Builders Ass'n v. Township of Holmdel*, 121 *N.J.* 550 (1990), the Council On Affordable Housing (COAH) issued an "Administrative Order" (AO) on January 28, 1991, announcing its intention to adopt regulations with respect to mandatory development fees designed to establish "standards and criteria for such ordinances" and "how fees collected prior to the *Holmdel* decision are to be handled." The AO also provided that municipalities which had collected such fees prior to the *Holmdel* decision could retain the fees in a separate, interest bearing account "provided that the municipality adopts and submits to COAH a duly adopted resolution of the municipal governing body expressing its intent to submit its ordinance to COAH immediately upon COAH promulgation of comprehensive regulations that set standards for such ordinance." About the same time or shortly thereafter, plaintiff developers and builders in these consolidated matters[1] either reactivated suits that had been previously stayed or instituted actions against the defendant municipalities to recover fees paid by plaintiffs under the municipalities' invalidated development fee ordinances. In each case, the defendant municipality relied upon the AO as a defense. COAH was permitted to intervene in each case and either moved for a stay of the proceedings pending promulgation of the regulations or a transfer to the Appellate Division, contending that any challenge to the validity of the AO must be heard in this court. Plaintiffs and defendant municipalities cross-moved for summary judgment.

Appendix A

On June 14, 1991, the Law Division judge in the matters involving the Township of Chester denied COAH's motion to transfer to the Appellate Division, holding that the provisions of *R.* 2:2-3(a)(2) were not applicable to these circumstances. He concluded that "the Supreme Court has decided that the ordinances are invalid and that the fees collected pursuant to those ordinances were invalidly collected and they go back to either developer or some derivative person appropriately thereunto authorized." He further decided that there was no way in which COAH could adopt a regulation or regulations which could result in the "resuscitation of these invalidly adopted ordinances."

However, the judge stopped short of granting summary judgment to the plaintiffs finding that "there still are open questions about who gets the money." Finally, he directed the parties to attempt to enter into a stipulation concerning terms for the refund. When he later learned that such a stipulation could not be agreed upon, he scheduled an evidentiary hearing to determine the amount owed to the individual plaintiffs. We granted COAH's motion for leave to appeal that interlocutory order and stayed the trial court proceedings pending appeal.

On July 15, 1991, the trial judge in the matter involving the Township of Holmdel addressed motions similar to those presented in the Township of Chester cases. He understood the Supreme Court's decision in *Holmdel* to say that the individual builders were entitled to start their own actions for a return of the money but did not interpret the decision to hold that the builders were entitled to a return of the monies as a matter of law and

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1. This court initially denied a motion to consolidate these matters but ordered that they be scheduled back-to-back for oral argument. Further consideration satisfies us that there are common issues which permit consolidation for the purpose of this opinion.

without the development of a full record. He considered the AO to be advisory and denied COAH's motion to transfer the matter to the Appellate Division and/or stay the proceedings pending decision on COAH's motion to obtain leave to appeal in the Township of Chester case. Instead, he elected to press forward with the litigation and scheduled a pretrial conference. We granted COAH's motion for leave to appeal and stayed the trial court proceedings pending appeal.

On July 30, 1991, the trial judge in the matters involving the Township of South Brunswick entertained motions involving arguments similar to those presented in the Chester and Holmdel matters. He denied COAH's motion to stay the cases and/or transfer them to the Appellate Division finding that the AO did not rise to the level of rule-making or *quasi*-judicial action. He further found "as a matter of law that any regulation, even one validly adopted *in futuro* and validly adopted by the municipality, would constitute an *ex post facto* rule or regulation, and you cannot now resuscitate that which was exacted illegally in the first place." Thus, he entered summary judgment in favor of the plaintiffs in those cases and ordered that the monies on deposit with the Township be returned to them. COAH and the Township of South Brunswick filed separate notices of appeal from this final judgment. Thereafter, we entered a stay pending appeal.[2]

Finally, on August 2, 1991, the trial judge in the matter involving the Township of Cherry Hill also denied COAH's motion for a stay and/or transfer to the Appellate Division. He concluded that no deference should be given to the AO and entered summary judgment in favor of plaintiffs ordering a return of the

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2. The order granting the stay permitted plaintiffs to obtain the money on condition that a bond or letter of credit is posted with the Clerk of the Superior Court.

money with interest. He also determined that the Cherry Hill ordinance was invalid because the Township Council substantially altered it by passing a resolution after the first reading increasing the fee from one percent to three percent without notification to the public. However, he stayed the order pending appeal. Cherry Hill and COAH filed separate notices of appeal.[3]

On appeal, COAH contends that in each case the validity of its AO was directly at issue and, for that reason, the trial judges erred in failing to transfer the cases to the Appellate Division for determination. COAH contends further that the AO was a reasonable exercise of its statutory authority under the Fair Housing Act (FHA), that it has the power to adopt regulations providing procedures to validate the invalidly adopted ordinances, and that the announcement of its intention to adopt such regulations is not *prima facie* invalid and should have been honored. The municipalities have essentially adopted the same position as COAH. However, in the Cherry Hill matter the municipality also contends that the trial judge erred in determining that the Cherry Hill ordinance was procedurally invalid.

We need not address the issue of whether the trial judges erred in denying COAH's motion to transfer that portion of the litigation before them challenging COAH's authority to issue the AO, nor need we decide whether the AO was a valid exercise of COAH's power. As we see it, those issues are simply ancillary to the primary issue which undergirds each of the orders under review, save perhaps the order stemming from the Holmdel matter. The principle issue to be decided is whether COAH has the potential

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3. COAH's motion to expedite all appeals was granted.

power[4] to promulgate regulations upon which the defendant municipalities may rely to validate prior action on their part in collecting the mandatory builders' fees. For the reasons stated herein, we conclude that COAH has such power and that there is sufficient general authority permitting municipalities to validate prior conduct. In light of this conclusion, we further hold that the trial judges should have deferred action for a reasonable period of time pending completion of the administrative process. Thus, whether the AO was validly promulgated and binding or whether it was simply advisory is of no moment. The matters should have been stayed pending COAH's proposed action whereupon the rights of the parties could be more clearly evaluated.

We begin our analysis by stating our understanding of what the Supreme Court in *Holmdel* decided and what it did not decide. Importantly, the Court held that "development fees are the functional equivalent of mandatory set-asides; and it is fair and reasonable to impose such fee requirements on private developers when they possess, enjoy, and consume land, which constitutes the primary resource for housing. Such measures do not offend the zoning laws or the police powers." *Holmdel, supra,* 121 *N.J.* at 573 (citation omitted). Not only did the Court determine that such fees are authorized by the Municipal Land Use Law (MLUL) and general police power, but it held that such fees were authorized by the FHA which

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4. We use the phrase "potential power" because the AO advises the reader of COAH's intent to promulgate regulations enabling municipalities to validate prior conduct under certain circumstances. We are now aware that COAH has promulgated such regulations and that there is an appeal pending which challenges them. We have specifically declined to address the particular regulations because the appeal was not perfected by the time these matters were heard.

> confers on a municipality a broad range of general powers, including the authority "to provide for its fair share of low and moderate income housing by means of any technique or combination of techniques which provide a realistic opportunity for the provision of [its] fair share." [*Id.* (citation omitted).]
>
> * * *
>
> Mandatory development fees that do not violate COAH requirements and otherwise meet standards of reasonableness are not inconsistent with the FHA. They may be fairly regarded as "other techniques proposed by the municipality." [*Id.* at 574 (citation omitted).]

However, the Court specifically declined to "determine the validity of uncompensated fees as applied by the municipalities in the cases now before us" perhaps because it remained to COAH "in the first instance to develop a comprehensive system of development fees." *Id.* at 576. The Court then found that COAH's exercise of rule-making authority in this area was "incomplete" because it had not specifically addressed mandatory development fees. Although finding that rule-making was necessary, the opinion recognized that COAH had taken action in these cases suggesting "an understanding that these measures are not invalid or *ultra vires.*" *Id.* at 579. The Court noted that COAH approved each of the municipality's housing plans which had included the builders' fee ordinances in question but failed to pass specifically on them finding that they were "'not required to implement the fair share plan.' " *Id.* at 579.

In essence, the Supreme Court found that COAH imperfectly exercised its jurisdiction because "the development-fee ordinances were subject to review and certification by COAH as a constituent part of the housing-element plan of the respective municipalities." *Id.* The Court then suggested that 1) COAH adopt regulations on the subject for the purpose of enabling courts "to determine that persons subject to such ordinances have been reasonably informed of their obligations," *id.*, and 2) "both municipalities and COAH in the adoption and approval of such ordinances are acting in conformity with the legislative intent of the FHA." *Id.* at 579-80. Consequently, in the absence of regulations the Court felt "constrained" to set aside the ordinances, *id.* at 580, because they were "not validly adopted." *Id.* at 585.

Lastly, the Court affirmed the Appellate Division's ruling that the New Jersey Builders Association lacked standing in the Chester Township matter to assert damage claims on behalf of its members. However, it acknowledged that the dismissal of the damage claim was "without prejudice to the right of individual members to *seek* refunds in separate actions." *Id.* at 586 (emphasis added). Thus, we agree with the trial judge in the Holmdel case, that the Supreme Court did not mandate that the money be refunded to the builders and developers as a matter of course. The words used by the Court were that individual members would have an opportunity to "seek" such refunds. *Id.*

Undoubtedly, the Court recognized that the invalidation of the ordinances would not necessarily require a complete refund. In such matters, issues concerning the disruption of governmental policies and other equitable considerations determine whether a decision of this nature should be given prospective effect only, *see Salorio v. Glaser*, 93 *N.J.* 447, 465-67, *cert. denied*, 464 U.S. 993, 78 L. Ed.2d 682 (1983); *Borough of Neptune City v. Borough of*

Avon-by-the-Sea, 61 *N.J.* 296, 310-11 (1972), retroactive effect, *see New Jersey Builders Ass'n v. Bernards Tp.*, 108 *N.J.* 223, 238 (1987); *Mill Race v. Mayor of Bernards Tp.*, 230 *N.J. Super.* 160, 167 (App. Div. 1989), or partial retroactive effect, *see Automatic Merchandising Council v. Township of Edison*, 102 *N.J.* 125, 131-132 (1986); *In re Fees of State Bd. of Dentistry*, 84 *N.J.* 582, 589 (1980). Although the records before the trial judges in the Chester cases and the Holmdel case are not complete, we assume that the trial judges in those cases recognized the relevancy of such issues, at least in part, and thus declined to enter full summary judgment in favor of plaintiffs. Thus, standing alone, considerations of such issues requiring as they do the development of a full record would be sufficient to reverse the summary judgments entered in the South Brunswick and Cherry Hill cases which were final.

More importantly, however, the Supreme Court did not decide whether COAH could promulgate regulations having the effect of validating prior municipal action. Indeed, it had no occasion to do so since COAH was not a party to that litigation and had not declared its intent to promulgate such regulations prior to the decision. Each of the trial judges, with the exception of the trial judge in the Holmdel case, found that COAH could not possibly act so as to permit validation of the subject ordinances. We disagree with their conclusion. It is important to reiterate that the ordinances in question were authorized by statute, *i.e.*, the MLUL, the general police power, and the FHA. Thus, they were not *ultra vires* acts by the municipalities. The distinction is important.

It is elemental "that if a municipal body or agency has the power to act, but has failed to follow exactly the proper procedures to exercise that power, its irregular, but not *ultra vires*, action may be subsequently ratified." *Ferreira v. City of Asbury Park*, 237 *N.J. Super.* 142, 162 (App. Div. 1989). Here, the municipalities were statutorily authorized to act. However, the Supreme Court was

unable to determine the validity of the uncompensated fees "as applied," *Holmdel, supra*, 121 *N.J.* at 576, because it could not compare the ordinances against "[r]egulatory standards" to ascertain whether they were in conformity with legislative intent as interpreted by COAH. *Id.* at 579-80.

Unlike the usual case in which a municipality may correct its prior invalid act, validation of the prior invalid acts in this case is dependent on COAH's administrative rule-making. In the context of this case, it is readily apparent that such administrative rule-making is legislative in nature. *Shapiro v. Essex Cty. Bd. of Chosen Freeholders*, 177 *N.J. Super.* 87, 95 (Law Div. 1980), *aff'd*, 183 *N.J. Super.* 24 (App. Div.), *aff'd*, 91 *N.J.* 430 (1982). COAH's AO expressed its intent to promulgate regulations having the effect of curing prior, imperfectly executed ordinances. In a general sense, legislative action can be specifically designed to enable a municipality to validate prior conduct. Such action is considered curative, thus permitting retrospective validation even where the initial municipal action may have been considered void. *See Edwards v. Mayor of the Bor. of Moonachie*, 3 *N.J.* 17, 21 (1949). If the Legislature can promulgate curative legislation having the effect of validating municipal conduct which at its inception was void, *id.*, we see no reason why an administrative agency cannot by properly exercising its rule-making authority cure municipal action which was not void *ab initio*.

While legislation and regulations are generally applied prospectively, *Gibbons v. Gibbons*, 86 *N.J.* 515, 521 (1981); *In re Appeal of Adoption of N.J.A.C. 7:7A-1.4*, 118 *N.J.* 552 (1990), *rev'd on dissent*, 240 *N.J. Super.* 224, 239 (App. Div. 1989), there are recognized exceptions to the general rule. *Gibbons, supra*, 86 *N.J.* at 522; *see Carnegie Bank v. Shalleck*, — *N.J. Super.* — (App. Div. 1992). A statute or regulation can be applied retrospectively where 1) the legislative body has expressed the intent to do so, 2)

the legislation is ameliorative or curative, 3) the expectations of the parties warrant retroactive application, and 4) manifest injustice to the adversely affected party does not result. *Gibbons, supra,* 86 *N.J.* at 522-23. The AO on its face expresses COAH's intent to pass regulations that are curative with the express intent to allow municipalities to retroactively validate prior conduct. We cannot pass on the merits of the third or fourth elements of the test without a more complete record.

We reiterate that we are now deciding only the question of whether COAH has the potential power to pass curative regulations and whether the municipalities have the potential power to validate prior ordinances that were not *ultra vires* their power to enact. We do not pass upon the regulations as promulgated or municipal conduct taken in response thereto. It is necessary only to point out that the decisions of the trial judges in the Chester, South Brunswick and Cherry Hill cases on this point were premature. Recognizing the potential for COAH to act appropriately in this field, the trial judges should have deferred further action for a reasonable period of time in the "spirit of comity." *Board of Educ. of Asbury Park v. Asbury Park Educ. Ass'n,* 145 *N.J. Super.* 495, 510 (Ch. Div. 1976). In our view the complex issues now presented in this litigation can be rationally decided only after COAH has been permitted to exercise the power which the Supreme Court in *Holmdel* recognized and the challenge to those regulations has been disposed of by this court. Thus, the trial judges should stay the subject actions until "the predicates for judicial disposition of the controversy as initially raised before [them are resolved]." *Daaleman v. Elizabethtown Gas Co.,* 150 *N.J. Super.* 78, 84 (App. Div. 1977), *rev'd on other qrounds,* 77 *N.J.* 267 (1978).

Finally, we address the question of whether Cherry Hill's mandatory development fee ordinance was improperly adopted in

that the fee was increased from one percent to three percent by resolution after the first reading of the ordinance. That issue was properly before the Law Division judge irrespective of the validity and effect of the COAH AO. *See Alexander's Dep't Stores of N.J. v. Borough of Paramus,* 125 *N.J.* 100, 112-13 (1991). The attempt to change a significant provision of the ordinance by resolution between the first and second reading renders the ordinance invalidly adopted. The substantial change required republication because of the additional burden on those affected. *See Gilman v. City of Newark,* 73 *N.J. Super.* 562 (Law Div. 1962).

However, the defect in the ordinance claimed by Cherry Hill Properties Corporation (CHP) is purely a procedural one and quite capable of detection upon passage by anyone who was affected by it. The ordinance as first published called for a one percent fee whereas the ordinance as adopted called for a three percent fee. At the time of adoption, CHP had obtained preliminary site plan approval and was in the process of obtaining final site plan approval. It cannot contend that it was unaware of the discrepancy which was a matter of public record. Such procedural deficiencies can be cured by appropriate action by the municipal governing body. It is for that reason that challenges of this nature must be presented within the time limitations provided in *R.* 4:69-6. *Trust Co. of N.J. v. Planning Bd. of the Bor. of Freehold,* 244 *N.J. Super.* 553, 560 (App. Div. 1990). Unlike the claims which undergirded the Supreme Court's decision in the *Holmdel* case, this challenge, limited as it was to a procedural defect, is neither of constitutional dimension nor of great public interest. Thus, there is no just cause to extend the forty-five day time limit permitted by the provision of *R.* 4:69-6(c). We hold that CHP's claim on this particular issue is time-barred.

Finally, CHP contends that the Cherry Hill ordinance is invalid as applied to it because it impermissibly altered the terms of

Appendix A

CHP's preliminary and final approvals. The issue was initially raised by CHP in a footnote in its brief before the trial judge. Although it was addressed by the defendant Township and again by CHP in its reply brief, the trial judge did not decide the issue. In any event, we conclude that the issue is without merit. *R.* 2:11-3(e). A builders' fee ordinance such as the one adopted by Cherry Hill is unrelated to any of the conditions over which the Cherry Hill Planning Board would have jurisdiction in granting preliminary approval.

The final judgments under review involving the Township of South Brunswick and the Township of Cherry Hill are reversed. All matters are remanded to their respective trial courts for further proceedings the nature of which must necessarily depend upon the outcome of the appeal now pending challenging the regulations passed by COAH.

I hereby certify that the foregoing is a true copy of the original on file in my office.

s/ [illegible]

Clerk

APPENDIX B — ORDER OF NEW JERSEY SUPREME COURT, FILED NOVEMBER 24, 1992

SUPREME COURT OF NEW JERSEY
C-365 September Term 1992
35,470

MORRIS INDUSTRIAL BUILDERS, INC.
Plaintiff-Petitioner,

v.

THE TOWNSHIP OF SOUTH BRUNSWICK, etc. et al.,
Defendants-Respondents.

AND OTHER RELATED MATTERS

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-6073/6080-90 and A-205/206/394/429-91 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, on this 23rd day of November, 1992.

s/ Stephen W. Townsend

CLERK OF THE SUPREME COURT

I hereby certify that the foregoing is a true copy of the original on file in my office.

s/ Stephen W. Townsend

CLERK OF THE SUPREME COURT
OF NEW JERSEY

APPENDIX C — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS OF NEW JERSEY SUPERIOR COURT, LAW DIVISION, JULY 19, 1991

SUPERIOR COURT OF NEW JERSEY LAW DIVISION —
MIDDLESEX COUNTY
DOCKET NO. W-013004-89 P. W.

GREEK, ET ALS,

Plaintiff,

VS.

SOUTH BRUNSWICK, ET ALS

Defendant.

TRANSCRIPT OF PROCEEDINGS

JULY 19, 1991
MIDDLESEX COUNTY COURTHOUSE
NEW BRUNSWICK, NEW JERSEY B E F O R E

BEFORE
THE HONORABLE C. JUDSON HAMLIN, J.S.C.

APPEARANCES:
VALERIE K. BOLLHEIMER, ESQ.
ATTORNEY FOR PLAINTIFF GREEK

DAVID B. RUBIN, ESQ.
ATTORNEY FOR PLAINTIFF MORRIS

Appendix C

PAUL CATANESE, ESQ.
ATTORNEY FOR DEFENDANT SOUTH BRUNS.

GERALDINE CALLAHAN, ESQ.
ATTORNEY FOR DEFENDANT COAH.

* * *

[18] have already been dispersed to one builder but may not be dispersed to him simply because of who was advising the town at the time.

Now, your Honor when we were here earlier mentioned that because of the importance and —of land use issues politically and governmental' in South Brunswick you wouldn't necessarily hold it against the town per se that different legal positions were taken. That doesn't mean they were right or wrong, but I think that whatever happens here, that that can't be over-looked in how the Court addresses these issues.

THE COURT: Okay.

MR. RUBIN: Thank you, Judge.

THE COURT: Thank you.

Miss Callahan.

MS. CALLAHAN: Thank you, your Honor.

THE COURT: Miss Callahan, before you begin your

argument perhaps you can help me on a couple of questions I might have. As I understand it from your position, the Council is currently considering forms of regulations which they now intend to adopt sometime in the future. Is that right?

MS. CALLAHAN: Yes, your Honor.

[19] THE COURT: Okay. And I'm a little fuzzy on my administrative law but if I understand correctly I'm asking you now, first tentative drafts of regulations. Correct?

MS. CALLAHAN: Yes, your Honor. If you'd like, I could give you a little summary of how the rule —

THE COURT: And then from there you advertise and have hearings published.

MS. CALLAHAN: Correct. You don't necessarily have to have hearings. You allow the opportunity for comment.

THE COURT: Comment. Okay.

MS. CALLAHAN: And generally that is written —

THE COURT: And that is a formal adoptive process.

MS. CALLAHAN: Yes.

THE COURT: Okay. And I suppose they've been doing this since January or at least since the Holmdel case was decided.

MS. CALLAHAN: Yes, your Honor.

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THE COURT: When would you anticipate the Council would have these adopted regulations?

MS. CALLAHAN: Finally in place I would [20] guess December and —

THE COURT: Would you bet me, would you be willing to pay all your co-counsel for lunch? There's a restaurant here called La Fontana. It's very expensive.

MS. CALLAHAN: I know that one.

THE COURT: Would you be willing to buy lunch for everybody if these aren't formally adopted by December?

MS. CALLAHAN: Almost, your Honor.

THE COURT: Out of your own pocket?

MS. CALLAHAN: Almost, because —

THE COURT: Almost?

MS. CALLAHAN: I say almost because I'm fairly certain that they will be done by then because, number one, the Council already had proposed regulations, orders in June. They did not formally propose them in the New Jersey register because some policy issues needed to be ironed out, so they anticipate to have all that ironed out for the proposal to go in the register for August or September.

Then there's also a thirty day comment period. Then after that the agency can adopt the regulations.

[21] THE COURT: Do you think that this issue will be addressed very shortly before the election?

MS. CALLAHAN: Your Honor, what the Council is going to do as far as the Council is not an elective body.

THE COURT: I know that and you know that. But you are not naive enough not to understand the impact of these kinds of issues on the public and the population.

MS. CALLAHAN: Frankly, your Honor, I have not heard any mention at all either, publically —

THE COURT: Of course not. Those things are never discussed openly. They just seem to happen and after thirty or forty years in this business you tend to see it happen a couple times. It's a reality. You deal with it.

It's not significant. I was just discussing timing and what happens when the municipalities that wish to voluntarily become part of this have to adopt ordinances, do they not?

MS. CALLAHAN: Yes, your Honor.

THE COURT: Okay. And we all know how [22] fast municipalities move, do their drafting, so would guess that if everything went as quick as you think it might, somewhere in the summer of 1992 South Brunswick might have an ordinance in place that could then be — properly be challenged.

MS. CALLAHAN: I would hope it would be before then.

THE COURT: I know you would hope.

MS. CALLAHAN: I can not guess as to what would happen.

THE COURT: Okay. And of course you would agree, given the issues that are involved in the legal history, that no matter what happens there certainly would be a challenge in the Court, both to the ordinance and to the regulations again.

MS. CALLAHAN: Yes, your Honor.

THE COURT: Which probably would not be resolved until the Supreme Court resolution two years after that. So we'd be talking about holding on to this money somewhere until 1994, 1995 until the resolution of the issue.

MS. CALLAHAN: Your Honor, the money is being held in a separate interest bearing account.

[23] THE COURT: I understand that. That wasn't my question, Counsel. We can reasonably predict under your scenario at least another four years before these people even will have an opportunity under your suggestion to get their money back, if in fact they are entitled to it.

MS. CALLAHAN: Your Honor, I'm not willing to predict how long it will take.

THE COURT: Okay.

MS. CALLAHAN: I think the important thing we have to remember here is suppose the Council goes ahead and does exactly what it says going to do right now and your Honor orders the funds to be returned and those funds are returned.

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Practically speaking, since your Honor seems to like to look at the reality of things, practically speaking, the towns aren't going to get that money back. The builders are going to have the money back. The money's going to be gone.

And if the Council is upheld throughout all the various appeals that probably will take place, that money will be gone.

THE COURT: Well, that assumes that you . . . .

* * *

[45] . . . was adopted. They paid the money on that ordinance and now we really have to correct what amount to the deficiencies.

THE COURT: I compliment you on your cleverness. Go ahead. What's next?

MR. CATANESE: That's it, your Honor.

THE COURT: Okay. Thank you.

The matter before the Court presents an interesting combination of social, political, and legal concerns. When I talk about social and political I do not mean to imply that those things play a part in the conclusions that I would reach. I mean to imply them in the broadest and best sense.

It deals with public policy regarding priorities of this State and the people of this State in regards to housing, and how to deal with the provision of housing for persons who are generally decided or conceived to be unable to afford them.

Those are significant policy decisions beyond the realm of this

Court, but they nonetheless are present and only a Court of unusual obtuseness would be unaware of them.

Whether or not as a matter of social [46] policy it is better for a government to provide housing or the private sector is beyond the purview of this Court, although concededly there are significant arguments made on both sides of the issue, but it deals with an extremely significant social goal and a manner of achievement.

COAH indeed probably owes its existence to precisely that tension that exists between the executive, legislative, and the judicial branches in this regard.

I don't think it uncommon to say that indeed many of the comments in many of the articles that appeared shortly after Mount Laurel One and Two that dealt extensively with these issues raised them.

There is a substantial body of opinion which concluded that the Supreme Court acted in the void of action by the Legislature to create remedy that some would argue was beyond the purview of a judicial body.

By the same token there are others who applauded that action as being Constitutionally mandated and dealing specifically with the responsibilities to the Supreme Court. Be that [47] as it may, it was a groundbreaking and unusual action by a Court in almost any state in the union.

It necessarily caused tension between the legislative branch and the judiciary because clearly in order to carry out the mandates of Mount Laurel, clearly actions of other branches of government had to be undertaken to complete or at least carry out the process.

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Thus in the context of a public out-cry COAH was created as a way of dealing with the somewhat unwieldy efforts of the Mount Laurel Court to establish or start resolving all manner of municipal land use that would still be consistent with what may be an out-dated idea of home rule in the State.

COAH was the agency to which the Legislature and the judiciary could retreat without confrontation and try to permit a more orderly and more consistent attack on a problem at hand.

That, however, is not, of course, an abdication of the responsibilities of the judiciary in general of overseeing administrative agency to determine if they comply [48] with minimal Constitutional guaranteed standards.

Those considerations, and because those things came about in that way, are much the reason why this continues to remain a wellspring of litigation, misunderstanding, and error.

Thus many years after Mount Laurel and COAH, I have yet to see empirically reliable studies to indicate how many homeless or low income people really have been provided affordable housing.

Affordable housing may well be argued to be less expensive housing, but still not affordable to the reach of the average fifteen or seventeen thousand dollar worker in this State.

We've done things like cluster zoning. We've reduced other requirements. We've done a whole number of things. We've done this wonderful business of trading money for housing units wherein more wealthy communities are able to give money to less wealthy communities to absorb their housing obligations. That has been sanctioned, but it's an interesting development given the alleged overall social policy considerations that might be accomplished.

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The instant case presents several issues [49] for this Court to resolve directly. Concededly Judge Stanton has reached a resolution on his cases and he has expressed his opinion. I might say Judge Stanton is a well-respected, thoughtful, reflective judge.

In our business there are some of us who are more or less able to deal with complicated issues. Certainly Judge Stanton's reputation is one as being able to deal both in sophisticated and complicated areas with competence and indeed with compassion.

Judge McGann's reputation needs no comment by me. He is a pragmatic, intelligent judge whose reputation is equally worthy in the Courts.

Having said that, their issues deal some respect in some small differences with some of the issues I have to deal with here but nonetheless reach the bottom number of the same issue and quite properly this will wind up in the Appellate Division. Whether I do it by way of order of transfer or whether I do it by way of judgment and order, it will wind up in the Appellate Division and eventually I expect the Supreme Court.

And it is not improper, given the [50] different posture of the different issues in the different counties, that it may well be, in terms of effective judicial resolution, for the Appellate Division or the Supreme Court to have before it cases in varying postures and procedural situations so they will have the opportunity rather than raise issues sua sponte, as the Attorney General points out, much to the surprise of all litigants and to the generation of further litigation, to have a broad and varied set of alternatives open to them so instead of inventing something new, that they may pick and choose something that reflects their evaluation of the situation.

Now, let's deal with one issue at a time. The first issue I think deals with the jurisdiction and the authority of this Court to deal with the case given the promulgation of the administrative order which is dated — what's the date of Mr. Griffith's order? Looks look January nineteen. Am I correct?

MS. CALLAHAN: It's twenty-eighth, your Honor.

THE COURT: Twenty-eighth.

MS. CALLAHAN: Yes.

[51] THE COURT: Okay. While these cases bear docket numbers subsequent to the original action, clearly the issues in dispute and the claim for relief has been before the Courts of this County long before this administrative order and indeed were disposed of by an order of Judge Figarotta wherein not only did he determine that the South Brunswick ordinances either were invalid or invalidly adopted, but not of legal dimension which could warrant the exaction of monies from private citizens and ordered the return of those funds.

The matter wound its way through the Courts and eventually wound up consolidated with the Supreme Court cases and resolved by the Supreme Court of the State of New Jersey. They resolved the matter from the existing facts and existing orders and existing body of law.

The only thing that they left open was the concern expressed by the Court below and that is that in terms of actual return, the industrial or professional group that had the standing to challenge the regulations were not the ones who could seek the returns and indicated that those returns would have to be sought separately.

[52] As Judge Stanton, I do not for a minute read into that the idea or the foreseeability by the Supreme Court of what subsequently happened in this action. I think in the context of the cases as they arose and the orders before them, which in this case were Judge Figarotta's orders required the money to be returned, indicated, at best, a mechanical or procedural relief by individual builders or persons who paid these exactions to determine the specificity of the nature of their claims and the exactness of the monies paid. That's all. I don't think it anticipated anything else.

What followed was a proposal by COAH for the governor's signature. It's not important why this matter was not signed or whether it was withdrawn or whatever. The bottom line is that the chief executive of this State took no action in regard to the proclamation of emergency or other conclusions or orders that might have been promulgated by him. But what's important and what's interesting is, in the letter of transmittal to Governor Florio dated January eleventh by Chuck Griffiths, the first sentence indicates I think the overriding concern that's [53] exhibited here.

Dear Governor Florio, quote, we have an immediate opportunity to retain in excess of thirty million dollars for affordable housing investments while creating construction and related jobs and income in our State, close quote. We got the money. The fact that we got this money illegally, folks, let's hold on to it.

For whatever reason, whether it was withdrawn or otherwise, it was not signed. Thereafter Mr. Griffiths promulgated on behalf of COAH the emergency administrative order which in essence presumed to direct all municipalities of the State of New Jersey who had funds on deposit pursuant to these ordinances to keep them, promising that sometime in futuro some regulation would be

promulgated which might comply with the requirements of the Supreme Court if the municipalities chose to adopt ordinances consistent with it.

As is evidenced by colloquy today, there is no clear schedule. There are some fond hopes that it will be done sometime by the end of this year and that perhaps all the public bodies will act in appropriate fashion sometime by the middle [54] of next year or perhaps a little later, which would only then for the first time, following COAH's argument, would permit the plaintiffs here to challenge the sufficiency of those ordinances and regulations in an attempt to get back the money that was concededly paid pursuant to an invalid, whether you call it an invalidly adopted or invalid in general, an ordinance which had no legal effect and under which Constitutionally is the only way a public entity, whether it be a legislature or a municipality or a county can exact from private persons monies.

There's only certain ways in a republican or a democratic society — I use those with the small letters — that governments may extract from its citizens money. That indeed is that which separates us from other forms of government.

And it is not, as I've ever understood it, in our Constitutional process permitted that monies may be held or obtained by a simple letter of an appointed public official. It frankly staggers the mind.

But be that as it may, the question here is: Does this constitute the type of regulatory [55] action which, by Appellate rule, can be asserted only before that body? This Court concludes that the answer to that is no. I conclude that the answer is no for two reasons. First, that where litigation has already begun, has been subject to judicial control and determination, indeed to disposition

by the Supreme Court of this State, under those circumstances a, quote, administrative order, close quote, not a rule promulgated consistent with the requirements of rules or regulations, is insufficient to rise to the level of a quote rule or quasi-judicial determination of an administrative agency, close quote, which gives rise to exclusive jurisdiction of the Appellate Division.

Rather I construe this letter to be precisely what it is, a stop-gap holding action, without standards. Not quasi-judicial. Not quasi-anything. And under those circumstances does not rise to that level.

I also point out that the Court, once it undertakes jurisdiction of a particular matter, may not be deprived of jurisdiction by some formal action such as a letter from Chuck Griffiths. It is simply, just because you write [56] on the letterhead of something called COAH, doesn't mean it's a rule or a quasi-judicial action.

And that's really frankly the only indicia of official action that we have is the letterhead. And I'm saying it very directly and I suppose very cruelly, but I want to frame the issue directly for the Appellate Division to give them a broad range of conclusions that they deal with. They're free to reject it, but they're also free to accept it.

So for those two reasons, A, it's already a matter of judicial determination, B, that it does not rise to the level of a ruling making it a judicial action. I'm not satisfied that the Appellate Division has exclusive jurisdiction. This Court does have jurisdiction. The motion to transfer is denied.

Now, to reach the merits of the cause, let me deal with a couple things first. Although you are not put on notice, Miss Callahan,

there was last week an application on behalf of Mr. Mezey's client for a turnover of funds.

In that regard I'm not quite sure how the Sheriff got a levy by a party not named in the [57] original litigation, but I am satisfied that given the clear statement of the Supreme Court that individual parties would have to make individual claims, that that envisages not merel obtaining a writ of execution under the original caption. It envisions a claim made upon a municipality and, failing their payment, separate litigation with a separate caption.

Under those circumstances a levy previously entered in this matter by Summerfield Suites Development Company was improvidently granted, is ineffective and shall be vacated.

If you want to get that money you have to do it by independent, separate action.

Mr. Catanese, I ask you to submit an order in that regard.

As to the issue of Summary Judgment, I'm not satisfied that any material issue of fact exists in this case. The motion to strike the late answer is denied. I am not satisfied that it — maybe it's not procedurally correct, but I don't have to reach that issue.

I will permit that issue or that answer to be filed and to be retained. But I am not satisfied that the sole issue that raises here is [58] to the entitlement or whether or not a rebate may or may not be due from Morris or any other persons is an issue which affects the claim before the Court and accordingly I am satisfied that all the other matters are concededly resolved.

The only question is the legal effect of the action of the

Supreme Court and the current litigation. It's ripe for Summary Judgment, and in this regard I observe two things. First, that the original order upon which the appeal is based not only concluded that the ordinances were improper, but ordered their return, ordered the return of fees and indeed South Brunswick undertook to return the principal fees paid in the one captioned matter and declined to pay the interest and then in others only declined to pay completely.

I'm satisfied that the effect of the lower Court order, once a disposition is made on the merits, is appropriate and effective, and was not vacated by the Court other than to indicate that individuals would have to apply for the money as opposed to the group representing all of them.

Under those circumstances I'm satisfied [59] that Summary Judgment should be granted, that the monies on deposit with the Township should be turned over.

But alternatively and further I think I have to deal with the order which has received somewhat rough handling on my part. I'm afraid I badgered Miss Callahan somewhat, not because I in any way am hostile to her. Her brief is well-thought out. She does what an adversary had to do. Did good research. Argued her position as diligently and as completely as possible.

But as I review the matter, the fatal aspect of this is that what COAH's trying to do is frankly what astonished Judge Stanton and astonished me and what we are doing here is determining that a public body which may act only within Constitutional legislatively mandated standards exacted monies from private citizens pursuant to an ordinance which had been declared illegal, thus the monies which were paid and are kept are illegal and obtained without authority.

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What COAH now seeks to do is to now hold the money raised on the theory that money is a scarce resource and in Mr. Griffiths' letter it says analogous, he uses that word, analogous to [60] the scarce resources.

The scarce resource theory talks about things that which, in equity, we used to call irreparable things, things which cannot be replaced.

If there's one common concept in the law is that money is not irreplaceable or irreparable harm. Legal damages have always been considered something that is not quote irreparable.

Money, although it may be difficult to obtain, is not a scarce resource. I may not have it, you may not have it, but somebody's got it. It's out there.

And I think the reasoning which substantiates or which validated the earlier decisions recognizing the scarce resource order as being within the purview of COAH and within their Constitutionally mandated standards does not apply where the res we're talking about is a replenishable source.

Sure you want it. But you hold it illegally. You attempted to.

I really don't understand and I rule here as a matter of law that any regulation, even one validly adopted in futuro and validly adopted by [61] the municipality, would constitute an ex post facto rule or regulation, and you cannot now resuscitate that which was exacted illegally in the first place. Hiding the gun after the robbery doesn't make it legal.

And I so rule. There are interesting questions.

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Getting to the policy question, which is not paramount in the context of what I am doing now, the answer is that COAH governmental bureaucracy is going to better provide housing and better dispose of the thirty million dollars that was in place and that it will create some social good. And without being an advocate, I can see the other side of that coin and I'm sure all of you are intelligent enough to see the other side of that coin also. Builders are going bankrupt in the State Jersey left and right. In the long haul that is not a healthy economic development for the State. They are a resource.

Do I like builders? Do we like anybody who goes up and knocks down a farm and trees and builds up houses and shopping centers? No. I don't like that. I don't want to see that. I [62] want my state to stay the same as it is right now. But that's not the issue.

Well, we're saying yeah, we want to hold your money. Well, how long are you going to hold my money? You got my money. How long are going to hold it? A year? years? Four years maybe? Gee. I might go out of business. My employees are going to go out of business. They're going to lose their jobs.

That, that housing tract that I had options on and mortgages on, I'm not going to be able to service the mortgage.

Well, the bank's going to come in. But the value of the collateral that they gave me the money on four years ago has depreciated. Given the housing market now the bank probably doesn't even want it. And if they do want it, what are they going to do with it? The bank might have some problems because then they've got collateral that isn't going to match the loan.

Do we have any banking problems now? I think we do. The answer is nothing happens in a vacuum.

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Sure you want it. Sure you want to build houses. But there's an effect on the other side [63] of the coin which while I can't properly concern myself with because I must properly apply the law, but you have to look at the overall housing development in the State provided by the State private developers. I think I have to look at that and that's why I get back to the fact or why, in colloquy, I talked about the fact that there may be other policy considerations which might be given rise to sometime in the future. Nothing is done in a vacuum.

We have an entirely different housing economy now than we did five years ago, ten years ago, or when Mount Laurel came down. It may well be that some of the regulations in practice have proved to be impractical, and there's no guarantee that these regulations will ever be adopted or, if so, when because the make-up of the bodies would be different, and the thrust, the policy thrust that may be put upon it may be different, which gets me back to the colloquy asked, if this order is valid that has been promulgated by Mr. Griffiths, it's valid. If it's invalid, it's invalid. If it's invalid for Constitutional standards, it's invalid for Constitutional standards. Invalidity will not [64] arise next June, next December, May of 1992, or June of 1994 if I have to judge the legality of the public action.

This thing put on the letterhead of the Council for Affordable Housing doesn't give me a Constitutional standard to do so.

Clearly even in Counsel's argument she concedes that if the regulations were not adopted over an extended period of time there would be some Constitutional deprivation.

Well, the money is being held without legal authority now and this letter doesn't give rise to, quote, legal authority, close quotes,

and under those circumstances I'm fully and completely satisfied that Summary Judgment in Greek, Timber Ponds, and Morris Industrial should be granted and is granted, and I will order the return of the funds in question.

* * *